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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 9.

SCHRIBER-SCHROTH COMPANY, *Petitioner*,

v.

THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, *Respondents.*

No. 10.

ABERDEEN MOTOR SUPPLY COMPANY, *Petitioner*,

v.

THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, *Respondents.*

No. 11.

F. E. ROWE SALES COMPANY, *Petitioner*,

v.

THE CLEVELAND TRUST COMPANY, CHRYSLER CORPORATION, *Respondents.*

Rejoinder to Respondents' Reply Brief on the Motions to Remand and the Petition for Rehearing.

JOHN H. BRUNINGA,
JOHN H. SUTHERLAND,
Counsel for Petitioners.

Washington, D. C.
January 23, 1941.

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In desperation to rescue the Jardine patent from invalidity, Respondents retreat, step by step, from their former contention that the structure, fuction and mode of operation of the Jardine patent is the same as the accused device. Now they take refuge behind a new rampart, Figure F, (Brief, pages 7, 8, 10, 11 and 13) asserting that the type

of action there shown and described (puckering or buckling of the web to shorten it) was not and could not have been in the interfering applications or the prior art. Suppose it wasn't, neither is it in the accused device. The web of Exhibit 1 is permanently shortened by the Keystone relief in the skirt. The web of Exhibit 1 does not pucker or buckle, but operates in an entirely different manner, as testified by the expert witnesses on both sides (Exhibit 4-A, R. 685; Jeffries, R. 46, 67, 325-6, 343-345; Stellmann, R. 245).

When it is realized that the horizontal slot in the accused device terminates (as the device shows on its face) at the inside of the ring flange, the following testimony of Respondents' witness would appear to dispose of the case (R. 93):

> "Q. Would you say that the objects and advantages and purposes of the Jardine patent are secured if the slots 29 were shortened to terminate about the inside part of the ring flange 23?
>
> "A. It would be quite difficult to secure successful operation under those conditions."

We point this out simply to show that the result of this litigation would remain the same (dismissal of the Complaint) no matter how many times it is reheard, remanded or reopened; and we think it is the settled rule* that cases will not be reheard or reopened unless a change of result is reasonably in prospect; for otherwise the error, if any, is a harmless one. This is a "case or controversy"; if Respondents have no "case" against Petitioners that ends it, notwithstanding the claim of academic inaccuracy (which does not exist) in the factual niceties of the opinion.

While we believe the for going is a sufficient answer to all of Respondents' contentions, we deem it propitious to cor-

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*_Treat_ v. _Jemison_, 131 U. S. Appendix cxxxv, 23 L. Ed. 134; _Burley_ v. _Flint_, 105 U. S. 247, l.c. 248, 26 L. Ed. 986; and cases cited 4 C. J. S. 2027 note 63, and 4 C. J. 623 note 15.

rect some impressions made by Respondents' latest brief, lest the Court be misled (references being to pages of Respondents' Reply Brief).

Estoppel, File Wrapper or Interference Record (pp. 2, 3, 16-17). Respondents' attempted distinction between file wrapper and interference record estoppel is of no import. This Court's decision makes no reference to "interference record estoppel". The presentation and cancellation of the claims appears from the file wrapper (R. 747-844). Loss of the interferences is indicated by the notation "Adverse" on pages 791, 794, 797, 799, 802, 805, 807, 810, 812, 814, 823, the rejection (R. 833-834) and the cancellation (R. 834). No reference need be had to an interference record to reveal the surrender of the claims.

Revival of Cancelled Claim (P. 4). The supposed "far cry" difference is only a difference of purpose or intent.

Balanced Skirt Flexibility (pp. 6, 10-11). We stated in our previous brief (page 5) that this is a result. We do not agree with the "proposition" that "it was error to read it into the interference counts". We say, if it is read into one claim, it must likewise be read into the others, which this Court did (Decision, page 9).

Jardine's Relief Was Common (P. 13). In the Petition for Rehearing Respondents took a bold position with reference to "relief", saying page 6: "that was a name—familiar in the art to describe any degree of skirt retraction which might be appropriate to a particular construction". Now Respondents welsh, and say (p. 13): "the relief which Jardine employed (and which was not the common relief) is a distinguishing characteristic of the Jardine patent." Contrary to what Respondents imply, Jardine's precise relief was old in the Pomeroy patent (R. 731) and the Ricardo piston (R. 684). On the other hand the type of relief embodied in the accused device is shown in the Schmiedeknecht patent (R. 551), which the Courts below held invalid.

Pool. The single sentence, commencing bottom page 10 our Reply Brief, cannot justify the innuendo cast at pages 19-20 of Respondents' latest brief.

Supplemental Oath (P. 19). We said nothing of "the law relating to supplemental oaths".

Spillman and Long. Respondents' insistence, throughout the latest Brief that the case be reopened for evidence anent Spillman and Long, is hollow. In our presentation, we assumed, arguendo, the correctness of the statements in the Watt's affidavit and showed, we think, that even so Respondent had no case. We said (page 12), and still say, what Watts said "can make no difference; for anyone in this art would inevitably read such reliefs into their disclosures". Our refutation of Respondents' arguments was not dependent upon reading anything into the Spillman or Long applications.

Patentability. As we understand this Court's decision, it held, in effect, that the allowed claims were unpatentable over the canceled and abandoned claims, because the Circuit Court of Appeals had held the subject matter uninventive *sans* flexible webs—which later "cannot be construed" (Decision, page 9) into the claims.

We submit that the showing made by Respondents justifies neither rehearing, reopening nor remand.

Respectfully submitted,

JOHN H. BRUNINGA,
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Washington, D. C.
January 23, 1941.

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